

STATE OF MICHIGAN
COURT OF APPEALS

FRANK LAWRENCE, JR.,

Plaintiff-Appellant,

v

CITY OF TROY,

Defendant-Appellee.

UNPUBLISHED
February 14, 2012

No. 300478
Oakland Circuit Court
LC No. 2008-095176-CZ

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order denying his request for the disclosure of records under the Freedom of Information Act ("FOIA"), MCL 15.231 et seq. We affirm in part, reverse in part, and remand.

I. BASIC FACTS AND HISTORY

This is the second time this case has been before this Court. Some of the background facts are available in our prior opinion, *Lawrence v City of Troy* ("*Lawrence I*"), unpublished opinion per curiam of the Court of Appeals, issued June 23, 2009 (Docket No. 289509). Pursuant to this Court's directive, the trial court on remand conducted an evidentiary hearing "to determine whether the public interest in disclosure outweighs the public interest in nondisclosure" with respect to the information plaintiff requested in paragraphs one, five, and six of his FOIA request. *Id.* at 8 (internal quotations omitted). Additionally, this Court also directed the trial court on remand to determine whether plaintiff is entitled to punitive damages. *Id.* at 9.

The three paragraphs in plaintiff's FOIA request that were at issue on remand were the following:

1. The full name of the officer who issued citation #733389. Please also include the full name of the second officer who was at the scene;

* * *

5. Any and all records that indicate whether one or both of the officers described in #1 above are subject to any guidelines, goals, or expectations as to how many traffic citations they must issue in a given period (i.e., a quota);

6. Any and all records relating to whether one or both of the officers described in #1 have ever been subject to any discipline or disciplinary proceedings for misconduct, misfeasance and/or malfeasance, including whether the officer(s) has ever been sued for official misconduct (i.e., civil rights claims under 42 U.S.C. § 1983).

After conducting an evidentiary hearing, the trial court required defendant to disclose the information requested in paragraph one of plaintiff's FOIA request and denied plaintiff's request for the records contained in paragraphs five and six. The trial court also denied plaintiff's request for punitive damages, determining that defendant's refusal to disclose the requested records was not arbitrary or capricious.

Plaintiff now appeals the trial court's determination that the records sought in paragraphs five and six of his FOIA request are exempt from disclosure. He also challenges the trial court's denial of punitive damages.

II. FOIA BALANCING

The purpose of the FOIA is set forth in MCL 15.231(2):

It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

The policy of the FOIA favors "full disclosure of public records unless a legislatively created exemption expressly allows a state agency to avoid its duty to disclose the information," and exemptions are narrowly construed. *Messenger v Consumer & Indus Servs*, 238 Mich App 524, 531-532; 606 NW2d 38 (1999).

MCL 15.243 provides for the exemption of certain disclosures. Relevant to the issues in this appeal, MCL 15.243(1)(s)(v), (vi), and (ix) state the following:

(1) A public body may exempt from disclosure as a public record under this act any of the following:

* * *

(s) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would do any of the following:

* * *

(v) Disclose operational instructions for law enforcement officers or agents.

(vi) Reveal the contents of staff manuals provided for law enforcement officers or agents.

* * *

(ix) Disclose personnel records of law enforcement agencies.

As this Court stated in *Lawrence I*, “Once particular records qualify under a listed exemption for law enforcement agency records, the remaining inquiry is whether the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance.” *Lawrence I*, unpub op at 8 (internal quotations omitted). “The burden is on the public body to prove . . . that a record is exempt under the public-interest balancing test.” *Landry v City of Dearborn*, 259 Mich App 416, 420; 674 NW2d 697 (2003). Application of the public-interest balancing test articulated in MCL 15.243(1)(s) is subject to the trial court’s discretion. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 472; 719 NW2d 19 (2006); *Landry*, 259 Mich App at 420. We review such decisions “for an abuse of discretion and cannot disturb the trial court’s decision unless it falls outside the principled range of outcomes.” *Herald Co*, 475 Mich at 472.

A. PARAGRAPH FIVE REQUEST

In paragraph five of his FOIA request, plaintiff sought:

5. Any and all records that indicate whether one or both of the officers described in #1 above are subject to any guidelines, goals, or expectations as to how many traffic citations they must issue in a given period (i.e., a quota)[.]

The trial court determined that the public interest in disclosure does not outweigh the public interest in nondisclosure with respect to the records sought in paragraph five. We conclude that the trial court abused its discretion in so ruling.

Plaintiff sought the information requested in paragraph five because of the seeming increase in the number of traffic citations issued in municipalities as a purported means of raising revenue in today’s adverse economic climate. This issue is a matter of public interest as evidenced by the Detroit News article that plaintiff attached to his motion for reconsideration in the trial court. According to the article, a large portion of the citation revenue collected in most metropolitan Detroit municipalities remains in the community, thus ostensibly giving municipalities an incentive to increase the number of citations issued. Regardless of the truth of that assertion, this issue is a matter of public interest and involves the inner workings of the government, regarding which the FOIA favors disclosure.

The trial court opined that the disclosure of records pertaining to expectations, or quotas, regarding the number of traffic citations that a police officer must issue may impair the department’s attempt to enforce traffic laws and create distrust among the citizenry regarding the

motivation behind a citation. We fail to understand how disclosing whether police officers are subject to a quota would impair the department's attempt to enforce traffic laws. Further, creating distrust among the citizenry by disclosing a governmental policy is not a valid reason to deny a FOIA request when it is the policy itself that creates the distrust.

The trial court also determined that disclosure of the records may reveal law enforcement priorities and strategic assignments relating to traffic enforcement. Again, we fail to understand how disclosing information pertaining to a quota would reveal such information. Therefore, the trial court abused its discretion by determining that the public interest in disclosure does not outweigh the public interest in nondisclosure regarding the records sought in paragraph five of plaintiff's FOIA request.

We note Captain Gerard Scherlinck testified that defendant's police officers are not subject to a quota. Therefore, presumably, defendant has no records indicating that either of the officers involved in issuing the citation to plaintiff's brother *is* subject to a quota. This does not foreclose the possibility, however, that records may exist indicating that the officers are *not* subject to a quota. Because plaintiff requested records that indicate *whether* either of the officers is subject to a quota, defendant must disclose such information if it exists.

B. PARAGRAPH SIX REQUEST

The trial court also determined that the records that plaintiff sought in paragraph six of his FOIA request are exempt from disclosure. In paragraph six, plaintiff requested:

6. Any and all records relating to whether one or both of the officers described in #1 have ever been subject to any discipline or disciplinary proceedings for misconduct, misfeasance and/or malfeasance, including whether the officer(s) has ever been sued for official misconduct (i.e., civil rights claims under 42 U.S.C. § 1983).

Clearly implicated is MCL 15.243(1)(s)(ix), which exempts disclosure of "personnel records of law enforcement agencies."

The trial court did not abuse its discretion by determining that the public interest in disclosure does not outweigh the public interest in nondisclosure with respect to *internal* investigation records. Captain Scherlinck testified that if such records were subject to disclosure, it would have a chilling effect on obtaining truthful testimony from officers for internal discipline purposes. Our Supreme Court recognized the validity of this concern in *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 365-366; 616 NW2d 677 (2000), where it concluded that the public interest favored nondisclosure of law enforcement internal disciplinary records. Thus, the trial court's reliance on this factor was reasonable and appropriate, and it did not abuse its discretion by determining that the public interest in the disclosure of *internal* disciplinary records does not outweigh the public interest in the nondisclosure of such records.

Regarding disciplinary records unrelated to internal departmental discipline, however, a contrary result is warranted. As previously recognized, MCL 15.231(2) favors the full and complete disclosure of information pertaining to the official acts of public employees. Whether

a police officer has been subject to disciplinary proceedings or sued for official misconduct is directly related to his or her public employment. Further, as this Court stated in *Lawrence I*, unpub op at 6, “whether [the two officers at issue] have ever been subject to any disciplinary action or sued for official misconduct is indicative of whether Troy Police Department is performing its core function.” The trial court’s speculation that police departments have procedures in place to admonish inappropriate conduct and ensure that only those officers who “adhere to the citizenry’s high expectations” continue to serve as officers is immaterial in the context of a FOIA action. The FOIA is a prodisclosure statute that favors public access to information. *Krug v Ingham Co Sheriff’s Office*, 264 Mich App 475, 482; 691 NW2d 50 (2004). Thus, disclosure is favored regardless of whether police departments have such internal procedures in place. Accordingly, the public interest in disclosure of records *unrelated to internal departmental discipline* outweighs the public interest in nondisclosure, and the trial court abused its discretion by concluding otherwise.

III. PUNITIVE DAMAGES

Plaintiff next argues that the trial court erroneously denied his request for punitive damages under MCL 15.240(7),¹ which requires a punitive damages award in the amount of \$500 if a court determines that a public body has “arbitrarily and capriciously” denied a FOIA request. This Court reviews for clear error the trial court’s determination whether the public body acted arbitrarily and capriciously. *Meredith Corp v City of Flint*, 256 Mich App 703, 717; 671 NW2d 101 (2003). Clear error exists if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made. *Johnson v Johnson*, 276 Mich App 1, 10-11; 739 NW2d 877 (2007).

Punitive damages in a FOIA case “may be assessed only if the court orders disclosure of a public record.” *Mich Council of Trout Unlimited v Dep’t of Military Affairs*, 213 Mich App 203, 221; 539 NW2d 745 (1995). Further, “[e]ven if defendant’s refusal to disclose or provide the requested materials [i]s a statutory violation, it [i]s not necessarily arbitrary or capricious if defendant’s decision to act was based on consideration of principles or circumstances and was reasonable, rather than whimsical.” *Meredith Corp*, 256 Mich App at 717 (internal quotation marks omitted).

We are left with a definite and firm conviction that the trial court erred when it concluded that defendant did not act arbitrarily and capriciously. Here, defendant denied plaintiff’s FOIA request simply because it considered the request to be a request for discovery related to a civil

¹ MCL 15.240(7): “If the circuit court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$500.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.”

infraction.² Defendant's stance is not reasonable or founded in any principle of law. While the court rules prohibit any discovery in civil infractions cases, MCR 2.303(A)(3), this was a FOIA request, not a request for discovery. This Court has made it clear that "[t]he fact that discovery is available as a result of pending litigation between the parties does not exempt a public body from complying with the public records law." *Central Mich Univ Supervisory-Technical Ass'n v Central Mich Univ Bd of Trustees*, 223 Mich App 727, 730; 567 NW2d 696 (1997). Additionally, a requester's identity and proposed use of the requested information is irrelevant when determining whether the information falls within an exemption. *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 205; 725 NW2d 84 (2006). Thus, there was no basis for defendant to summarily reject plaintiff's request simply because the material related to a civil infraction.³ As a result, we conclude that defendant denied plaintiff's request in an arbitrary and capricious fashion, and we remand for the calculation and award of damages pursuant to MCL 15.240(7).

Plaintiff also contends that this Court should award him reasonable fees, costs, and disbursements under MCL 15.240(6)⁴ regarding paragraphs five and six of his FOIA request. Plaintiff, however, has abandoned appellate review of this issue by failing to offer any argument in support of his position. An "appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for [a] claim[.]" *DeGeorge v Warheit*, 276 Mich App 587, 596; 741 NW2d 384 (2007). Moreover, a court has discretion whether to award attorney fees, costs, and disbursements when a plaintiff only partially prevails in FOIA litigation. MCL 15.240(6); *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 151; 683 NW2d 745 (2004). We decline to award such attorney fees, costs, and disbursements based on plaintiff's abandonment of this issue and his delay in hiring an attorney. We note that plaintiff represented himself throughout the overwhelming majority of this litigation and only recently

² If fact, defendant even admitted that its denial was accomplished through the means of a "standard denial letter" that is used for any request involving an open criminal or civil infraction matter.

³ We also note that some of defendant's subsequent reasons for denying the FOIA request similarly were found not to have any rational basis. See, e.g., Part II.A, *supra*. Another example includes defendant's claim, in its response to plaintiff's motion for summary disposition, that it, as a matter of practice, would not disclose contents of radio transmissions between officers and dispatch because they *frequently* contain information of a private or confidential nature. While this assertion may be true, defendant's generalizations are not availing in this FOIA context since it never contended that the material in *this* instance contained anything of a private or confidential nature that was entitled to protection under the statute.

⁴ MCL 15.240(6): "If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements."

obtained an attorney to represent him in the instant appeal. A person proceeding in propria persona is not entitled to collect attorney fees. *Laracey v Fin Institutions Bureau*, 163 Mich App 437, 441-442; 414 NW2d 909 (1987).

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219 with neither party having prevailed in full.

/s/ Mark J. Cavanagh

/s/ Kurtis T. Wilder

/s/ Donald S. Owens